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FORUM

The Fight Against Global Terrorism: Self-Defense or Collective Security as International Police Action? Some Comments on the International Legal Implications of the 'War Against Terrorism'

By Jost Delbrück

A. Introduction

Few acts of international violence and the reaction to them have triggered a more intense international legal debate than the heinous terrorist attacks on the New York World Trade Center, the Twin Towers, and the United States Department of Defense, the Pentagon. Numerous articles and comments have been written in international legal journals and leading newspapers or have been communicated to the public via the internet.¹ This intense debate was certainly triggered by the unprecedented way by which this horrendous act of terror was carried out, *i.e.* the use of four hijacked civilian aircrafts, with hundreds of passengers on board, as a means of

¹ See, *inter alia*, Christian Tomuschat, Der 11. September und seine rechtlichen Konsequenzen, Europäische Grundrechte Zeitschrift (EuGRZ), vol. 28, 2001, 535; Christian Tietje/Karsten Nowrot, Völkerrechtliche Aspekte militärischer Maßnahmen gegen den internationalen Terrorismus, Neue Zeitschrift für Wehrrecht, 2002, 1; Thomas Bruha/Matthias Bortfeld, Terrorismus und Selbstverteidigung, Vereinte Nationen (VN), vol. 49, 2001, 161; Jasper Finke/Christiane Wandscher, Terrorismusbekämpfung jenseits militärischer Gewalt, VN, vol. 49, 2001, 168; Nico Schrijver, Responding to International Terrorism: Moving the Frontiers of International Law for 'Enduring Freedom?', Netherlands International Law Review (NILR), vol. 48, 2001, 371; Alain Pellet, No, This is not 'War', available at: http://www.ejil.org/forum_WTC/; Antonio Cassese, Terrorism is also Disrupting Some Crucial Categories of International Law, *id.*; Carsten Stahn, Security Council Resolutions 1368 (2001) and 1373 (2001): What They Say and What They Do not Say, *id.*; Frédéric Mégret, 'War'? Legal Semantics and the Move to Violence, *id.*; Giorgio Gaja, In What Sense Was There an 'Armed Attack?', *id.*; Pierre-Marie Dupuy, The Law after the Destruction of the Towers, *id.*; Terrorist Attacks on the World Trade Center and the Pentagon, ASIL Insights, with contributions by Frederic L. Kirgis, Gregory H. Fox, Jordan Paust, John Cerone, Arnold N. Pronto, B. Welling Hall and Said Mahmoudi, available at: <http://www.asil.org/insights/insigh77.htm>.

mass destruction. Furthermore, the attacks on the Twin Towers and the Pentagon were immediately understood by the public as attacks on two symbols of Western/American economic and military power and thus as attacks on not only the United States but also on the civilized world in general. Last but not least, the fact that the attacks, causing the death of thousands of civilians – mainly from the United States but also from many other countries –, were carried out by a relatively small group of terrorists right under the eyes of the public around the world, contributed to the almost universal involvement in the debate over the causes and the moral, political, and legal implications of this act of terror.² But the extraordinary concern of the international legal community with the events of 11 September 2001 also has to do with the fact that the extent and impact of the terrorist attacks by private individuals (although also supported by the governments of a few states) has brought to light the new dimensions of the threats of violence by a non-territorialized, borderless global terrorism that clearly transcends not only the traditional but also the modern concepts of international warfare.³ As *Christian Tomuschat* in his recent lucid and comprehensive article on “*Der 11. September 2001 und seine rechtlichen Konsequenzen*” (September 11 and its Legal Consequences, translation by the author) has aptly observed: New challenges and new dangers require new answers.⁴ It is exactly this aspect of the attacks of September 11 that shall be addressed in the following paper. The focus will be on the critical question whether the responses to the attacks by the US-lead world-wide coalition against terrorism properly fit the legal preconditions and requirements for the lawful exercise of individual or collective self-defense and the political implications that will or could entail from the present strategy followed by the United States and the coalition (C.). The paper will also discuss the collective, United Nations based efforts to rebuild Afghanistan as a viable lawful state, and it will ultimately discuss whether there may have been a viable alternative approach to the undoubtedly necessary enforcement measures based on the principle of collective or individual self-defense, thereby testing whether a truly new answer to the new threat scenarios could be conceived of and what its political consequences, particularly for the future campaign against global

² In this regard the September 11 attacks differ from other disastrous events that caused even more casualties – like the air raid on Dresden – but occurred as part of interstate war by military forces or – like at Pearl Harbor – as an act of aggression by military forces on the order of the Japanese Government.

³ For an excellent account of the events of 11 September in the light of the process of globalization see *David Held*, *Violence, Law and Justice in a Global Age*, *Indiana Journal of Global Legal Studies*, vol. 9, 2002 (forthcoming); also available at: <http://www.ssrc.org/sept11/essays/held.htm>; for an earlier comprehensive analysis of the impact of globalization on the concepts of war and violence see *Mary Kaldor*, *New and Old Wars*, 1998; *id.*, *Reconceptualizing organized violence*, in: *Daniele Archibugi/David Held/Martin Köhler* (eds.), *Reimagining Political Community*, 1998, 91.

⁴ *Tomuschat* (note 1), 535.

terrorism, could be expected to be (D.). At the beginning, however, a few methodological remarks are in place (B.), since in dealing with highly sensitive political problems, the international jurist faces the dilemma that he or she has to rely on the available information that is necessarily incomplete and sometimes even tenuous because the national and international decision-making process, as matter of course, is not open to the public.⁵

B. Methodological Prolegomena

Besides the problem of a potential or actual informational gap that the international jurist faces, there are further methodological problems that need to be addressed before going into the substantive argument. One is that the outcome of the legal assessment of the responses to the September 11 attacks undertaken by the United States and the coalition and – to some extent – by the United Nations depends on whether one looks at these actions from an *ex ante* or from a later point of time like, for instance, the time when such assessment is made. In the first alternative, the assessment has to be based on the facts and the information available to the decision-makers as well as to the assessing writer at that earlier time. A later critique would have to assess the earlier evaluations without taking cognizance of information disclosed later. For example, to resort to an act of self-defense presupposes a clear knowledge as to who is the attacking state or other actor. In the early days following the attack on the Twin Towers, that was not clear at all. Thus, some authors writing just about two weeks after the event vigorously denied that the attack by the hijackers brought about a state of war as hitherto defined by international law.⁶ Other writers clearly indicated that the attacks were of a novel character, but argued that we were witnessing a widening of the concept of self-defense that is now to include ‘armed attacks’ by non-state actors like terrorists.⁷ Today we know more about the involvement of the Taliban regime in the support of the terrorists, thus the legal argument can be made on somewhat firmer ground. Still, there is no clear-cut answer to the question from which point of time – *ex ante* or a later date – the legal assessment of given countermeasures is to be undertaken. The

⁵ Correctly *Tomuschat* (note 1), 535.

⁶ See *Pellet* (note 1), arguing that the attacks did not constitute war; *Cassese* (note 1) observing that ‘war’ in this case is a “misnomer”; this is also clearly stated by *Tomuschat* (note 1), 536; *Paust* (note 1) who, however, argues that self-defense according to Art. 51 UN Charter extends to attacks by non-state actors.

⁷ Whether the argument of an ongoing change of the meaning of the concept of self-defense is a tenable position to take need not be decided at this point. The fact is that this argument reflects the insecurity of the respective authors with regard to the factual situation obtaining at the time of their legal assessment: could the attacks be attributed to a state and could the attacks be classified as ‘armed attack’ in the sense of Art. 51 UN Charter?

most reasonable approach appears to be that the assessment should be based on the available information at the time of writing and thereby accepting the risk of error. The present paper will follow this approach.⁸

A last methodological point needs to be mentioned here. Assessing the legality and legitimacy of countermeasures against terrorists, like any legal assessment of given actions, necessarily involves value judgments or – more modestly put – political determinations as to the adequacy of the actions taken. This is particularly true in cases where the subject matter discussed is of extreme political sensitivity like it is the case with regard to the September 11 attacks that rightly have caused great outrage. One may – as a matter of principle – object that political considerations or subjective value judgments have no place in scholarly legal arguments. However, as much research into the process of legal decision-making has shown, legal determinations are – all honest efforts to abide by the highest standards of legal craftsmanship notwithstanding – invariably influenced by the preconceptions of the person applying the law.⁹ This is particularly true with regard to international law, which has been referred to as a political law,¹⁰ meaning that it has a special proximity to international politics as it deals with the political relations of sovereign states. Thus, international jurists are not discussing state actions in a political vacuum but are certainly influenced by the political environment in which they work. This does not mean that their legal assessments of certain state actions or other international events are simply political statements in legal disguise. But it is important that the international legal discourse remains transparent in the sense that the individual writer lays open her or his political and conceptual perspectives in order to provide for the opportunity of other participants in the discourse to know the preconceptions from which approaches he or she develops the argument. The present author is firmly convinced that global terrorism as a crime against humanity has to be met with a collective complex response that is commensurate to the novel character of global terrorist violence. This response ranges from international collective police action to bring the individual terrorists to justice, to collective enforcement action under the authority of the United Nations against such states that actively support terrorism, to individual and collective self-defense, and at the same time to collective actions to address the root causes of global terrorism that ultimately can be traced

⁸ Following the same line *Tomuschat* (note 1), 535.

⁹ See *Josef Esser*, *Vorverständnis und Methodenwahl in der Rechtsfindung*, 2nd ed., 1972.

¹⁰ *Wolfgang Graf Vitzthum*, in: *id.* (ed.), *Völkerrecht*, 2nd ed., 2001, 8; *Louis Henkin*, in: *Louis Henkin/Lori F. Damrosch/Richard C. Pugh/Oscar Schachter/H. Smit*, *International Law*, 4th ed., 2001, 1; along the same line with slightly different terminology *Alfred Verdross/Bruno Simma*, *Völkerrecht*, 3rd ed., 1984, 17; *Hanspeter Neuhold*, in: *Neuhold/Waldemar Hummer/Christoph Schreuer* (eds.), *Österreichisches Handbuch des Völkerrechts*, 3rd ed., 1997, note 1; *Georg Dahm/Jost Delbrück/Rüdiger Wolfrum*, *Völkerrecht*, 2nd ed., 1989, Vol.I/1, 28.

back to a complex mix of grave social and economic disparities, to fears of loss of cultural identity of particular nations under the impact of globalization, and to related ideological and religious fundamentalisms. The following sections will address some important concerns with regard to the argument that the present response to the September 11 attacks can be clearly based on self-defense and will then argue why future actions need to be carried out under the auspices of the United Nations for legal as well as political grounds.¹¹

C. The Self-Defense Argument

I. One of the fundamental principles of modern international law is the prohibition "of the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" as it is provided for in Art. 2 (4) UN Charter (hereinafter: UNCh) and is also recognized as a basic principle of customary international law.¹² The military action taken by the United States and Great Britain with the logistic support of several other states undoubtedly constitutes the use of force against another state, it would therefore be in breach of Art. 2 (4) UNCh unless it is justified by one of the exceptions by which use of force is permissible, *i.e.* either as an enforcement action under Chapter VII UNCh or as an act of self-defense under Art. 51 UNCh.¹³ There is general agreement that the present military action against the Taliban regime (and thereby against Afghanistan) and the Al'Qaida network under the leadership of *Osama Bin Laden* is *not* an enforcement measure under Chapter VII. Although the Security Council in Resolutions 1368 and 1373¹⁴ expressly determined that the September 11 attacks constituted a threat to international peace, and stated in Resolution 1373 that it was acting under Chapter VII of the Charter, the Council did not decide on any enforcement measures under Chapter VII, nor did it expressly authorize certain states to undertake such enforcement action, unlike in Resolution 678 in the case of the Iraqi aggression against Kuwait.¹⁵ Thus, only self-

¹¹ In the same vein see *Mégret* (note 1), section 3, 2.

¹² See *Albrecht Randelzhofer*, Art. 2 (4), note 58, in: *Bruno Simma et al.* (eds.), *The Charter of the United Nations – A Commentary*, 1995 with extensive further references.

¹³ Correctly *Tietje/Nowrot* (note 1), 4.

¹⁴ For the text of these resolutions see SC Res. 1368 of 12 September 2001; and SC Res. 1373 of 28 September 2001; a German translation of the resolutions is reproduced in: VN, vol. 49, 2001, 197 *et seq.*, and 198 *et seq.*

¹⁵ On this point see the detailed analysis of the wording of Resolutions 1368 and 1373 offered by *Stahn* (note 1), section 3, 1, who correctly observes that Resolution 1373 differs from Resolution 678 of 29 November 1990 where the Council, acting under Chapter VII, expressly authorized "Member States cooperating with the Government of Kuwait ... to use all necessary means to uphold and to implement resolution 660 (1990) and all subsequent relevant resolutions

defense remains as the sole ground for justifying the present military actions that began on 7 October 2001.¹⁶

As a preliminary point, it has to be clarified which precisely is the legal basis of the right to self-defense. This is necessary because there is some controversy over the question whether the right to self-defense under Art. 51 UNCh supersedes the right to self-defense under customary international law, and whether both rights are identical in scope or not.¹⁷ Allegedly, there is an advantage in relying on the customary right to self-defense because it offers a wider range of responses against the enemy in that it permits self-defense against hostile acts short of an armed attack, particularly against an imminent threat of an armed attack, *i.e.* preventive self-defense.¹⁸

Others maintain that Art. 51 UNCh deliberately restricted self-defense to the occurrence of an armed attack in order to foreclose or at least minimize an abuse of the right to self-defense.¹⁹ In addition, it has been correctly pointed out that member states of the United Nations are bound by Art. 51 UNCh as a provision of a treaty to which they are a party.²⁰ Be that as it may, in the instant case it is clear that the United States as well as Great Britain are relying on Art. 51 UNCh since they have expressly said so in a letter to the Security Council.²¹

and to restore international peace and security in the area." No such language is used in Resolution 1373.

¹⁶ See *Tomuschat* (note 1), 538, 540; it is worth mentioning that the Security Council did not expressly authorize measures of self-defense, either. It merely 'reaffirmed' the inherent right to self-defense in the preamble of resolutions 1368 and 1373 and only referred to the attacks, like all other acts of international terrorism as a threat to international peace and security. It did not classify the attacks as 'armed attacks,' thus using a much more restricted language than, for instance, in Resolutions 660 of 2 August 1990 and 678 of 29 November 1990 concerning the Iraqi invasion of Kuwait; see *Stahn* (note 1), section 3, 1 *et seq.*; *Mégret* (note 19), section 3, 3. Of course, the exercise of self-defense does not need Security Council authorization, but an explicit authorization would have added to the legitimacy of the self-defense measures taken.

¹⁷ For a detailed discussion of the problem see *Randelzhofer* (note 12), note 38 *et seq.*; *Kevin C. Kenny*, Self-Defence, in: *Rüdiger Wolfrum* (ed.), *United Nations Law, Policies and Practice*, 2nd ed. 1995, notes 6 *et seq.*; *Yoran Dinstein*, *War, Aggression and Self-Defence*, 2nd ed., 1994, 175 *et seq.*

¹⁸ See *Randelzhofer* (note 12), note 39; for a detailed discussion of this question see also *Dinstein* (note 17), 179 *et seq.*

¹⁹ See *Dinstein* (note 17); *Kenny* (note 17), note 8.

²⁰ *Randelzhofer* (note 12), note 40.

²¹ See Press Statement on Terrorist Threats by Security Council President of 8 October 2001, available at: <http://www.un.org/News/Press/docs/2001/afg152.doc.htm>; and Office of the Press Secretary, Press Briefing by *Ari Fleischer*, 31 October 2001: "We're acting in self-defense in the finest traditions that set our nation apart from most other nations"; see also *Stahn* (note 1), section 3, 3; *Mégret* (note 1), section 3, 1.

The lawful exercise of self-defense according to Art. 51 UNCh requires, first of all, that an armed attack against a member state has been undertaken. Art. 51 UNCh is silent on the question as to who has to launch an armed attack that could trigger the exercise of self-defense. Traditionally, it has been assumed that Art. 51 UNCh had to be read as meaning the armed attack had to come from another state.²² It can be assumed that the authors of the UN Charter, indeed, had this scenario in mind, but as a matter of fact, Art. 51 UNCh does not say so. Yet, the United States and Great Britain as well as many authors have taken great pains to establish that the terrorist attack was ultimately related to a state, *i.e.* Afghanistan.²³ Although not relevant with regard to the status of the attacker as such, the problem of state involvement is crucial in the sense that self-defense against a non-state actor not always but in most cases will necessitate carrying out measures of self-defense in the territory of a state where the attackers are headquartered or have taken refuge. Given the voluminous anti-terrorism conventions and even more numerous determinations by the UN Security Council and the UN General Assembly to the effect²⁴ that states supporting, harboring or tolerating terrorists are in violation of the fundamental obligation to suppress and eliminate international terrorism, it is a tenable position that the Taliban regime is sufficiently involved in such illegal actions to be held responsible and therefore subject to the consequences of acts of self-defense.²⁵

²² This traditional perspective is clearly reflected in the Definition of Aggression, adopted by the UN General Assembly GA Res. 3314 (XXIX) on 14 December 1974. Art. 1 defines aggression as "the use of force by a State against the sovereignty, territorial integrity or political independence of another State ...," and an explanatory note (a) adds that the term 'State' "is used without prejudice to questions of recognition," thus indicating that *de facto* regimes are included; see also *Tomuschat* (note 1), 540 with further references.

²³ The United States and Great Britain took great pains to present conclusive evidence to the Security Council of the involvement of the Taliban regime in Afghanistan in the support of the terrorist activities by Al'Qaida under the leadership of *Osama Bin Laden*, evidence that satisfied the Security Council, see Press release of 8 October 2001, UN Doc. SC/7167. For a critical assessment of the standards of proof applied by the Security Council see *Mégret* (note 1), section 4, 5. A careful argument establishing the responsibility of the Taliban regime/Afghanistan is offered by *Tietje/Nowrot* (note 1), 6 *et seq.* with further references.

²⁴ Up to now there are nineteen international conventions against terrorism and, in addition, the UN Security Council and the UN General Assembly time and again have condemned terrorism, for a complete survey see *Schrijver* (note 1), 274 *et seq.*; the most far-reaching conventions are the 1997 International Convention for the Suppression of Terrorist Bombings, GA Res. 52/164 of 15 December 1997, Annex, and the International Convention for the Suppression of the Financing of Terrorism, GA Res. 54/109 of 9 December 1999, the latter being 'legislated' with binding force by the Security Council acting under Chapter VII UNCh with SC Res. 1373 (2001); see also *Tomuschat* (note 1), 537; for the history of the campaign against international terrorism see also *Tietje/Nowrot* (note 1), 1 *et seq.*

²⁵ See *Tomuschat* (note 1), 541; *Tietje/Nowrot* (note 1), 6 *et seq.*; *Kirgis* (note 1); *Paust* (note 1); with some caveats also *Cerone* (note 1).

It is much easier to make the argument that the terrorist attack of September 11 amounts to an armed attack. Although perpetrated by private individuals and not by military units or other means, it cannot be disputed that turning an almost fully fueled big airliner like a guided missile into the Towers and the Pentagon, causing an immense destruction of lives of thousands of people, constitutes an armed attack in the sense of Art. 51 UNCh. Although not expressly mentioned in Art. 51 UNCh, the very idea of self-defense as a means of self-help requires a "necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment of deliberation."²⁶ From this widely accepted definition, it has been concluded that self-defense contains an element of immediacy, but it is also agreed upon that the defending state has to be given a reasonable time to decide on the appropriate measures to be taken.²⁷ In the present context, the lapse of little over three weeks between the attack and the beginning of the military action by the United States and Great Britain does not appear unreasonably long in view of the gravity of the attack on the one side and the large scale use of force to be applied. Seen in a larger context, the question of self-defense and time raises concerns that will be addressed later on.²⁸ Thus, it appears that the requirements of the applicability of Art. 51 UNCh are fulfilled with the proviso, though, that the measures of self-defense have to stay within the bounds set by the principle of proportionality and the rules of international humanitarian law. Like in the case of the Kosovo intervention, this is a critical point because the massive use of air raids and the use of particularly destructive munitions always carry the danger that the so-called collateral damages, *i.e.* the infliction of death and serious injuries to civilians and damages to non-military installations, become disproportionate despite all efforts to avoid such impacts.²⁹

²⁶ *The Caroline* incident 1837, statement by US Secretary of State *Daniel Webster* in the diplomatic correspondence ensuing from the incident, see Correspondence between Great Britain and the United States, respecting the Destruction of the *Caroline*, British and Foreign State Papers, vol. 26 (1837–1838), 1372–1377, vol. 29 (1840–1841), 1126–1142, vol. 30 (1841–1842), 193–202; see *Werner Meng*, *The Caroline*, in: *Rudolf Bernhardt et al.* (eds.), *Encyclopedia of Public International Law (EPIL)*, vol. I, 1992, 537 *et seq.*; see also *Sir Robert Jennings/Sir Arthur Watts* (eds.), *Oppenheim's International Law*, vol. I/1, 9th ed., 1992, 421.

²⁷ It has to be noted, though, that the longer the time span between the attack and the response, the more such defensive response gets 'dangerously' close to look like an armed reprisal, see *Mégret* (note 1), section 4, 1, which is not permissible under Art. 2(4) UNCh; on the necessity of distinguishing between measures of self-defense and armed reprisals see *Jennings/Watts* (note 26), note 419; on reprisals by use of force see *Karl Josef Partsch*, *Reprisals*, in: *EPIL* (note 20), vol. IV, 2000, 200, 202.

²⁸ See on this problem *Mégret* (note 1), section 4, 1 *et seq.*

²⁹ According to the available information, the United States and Britain tried to take great care to avoid disproportionate collateral damages. Yet there were also reports on missiles having gone astray hitting civilians and non-military objects such as a UN relief center, see *Archiv der Gegenwart*, vol. 71/11, 2001.

In addition, Art. 51 UNCh provides that the exercise of self-defense is limited to such time "until the Security Council has taken measures necessary to maintain international peace and security."

In order to enable the Security Council to react, Art. 51 UNCh also requires that the Council shall be informed immediately of the measures taken by the defending state. The latter requirement was fulfilled by the United States and Great Britain.³⁰ It could be argued, however, that the Security Council did take action itself. In Resolution 1373, the Council, in the operative part of the Resolution, decided on a large number of measures that should be undertaken by the UN Member States. Particularly, in paragraph 3 c), the Council called upon all states to cooperate within the framework of bilateral and multilateral arrangements and agreements in order "to prevent and suppress terrorist attacks and take action against perpetrators of such acts." While couched in terms that deviate from earlier authorizations by the Security Council of states members to take enforcement measures under Chapter VII, taken by itself, this section of Resolution 1373 could be taken as a mandate for the states members to take the necessary measures to ensure the implementation of this and earlier resolutions on the elimination of terrorism. However, as has been convincingly argued, the context in which this section is set out, *i.e.* within the list of non-forcible measures to be undertaken by the states members, it is unlikely that it could be interpreted as an action by the Security Council within the meaning of Art. 51 UNCh. Thus, it appears that no preemptive action by the Council was taken. In turn, this means that the military action by the United States and Great Britain, taken on face value, conforms to the requirements of Art. 51 UNCh.

II. Although the case for the legal and legitimate exercise appears to be water-proof, some intriguing problems remain: First, there is the problem that the military action by the United States (and obviously also by Great Britain) aimed at the destruction of the Al'Qaida strongholds in Afghanistan and at the arrest of its leader, *Osama Bin Laden*. But soon after the military actions got under way, this limited goal of the operations changed to the broader aim of deposing of the Taliban regime itself. Of course, there are many good reasons to do away with a clearly dictatorial regime that undoubtedly displayed a persistent pattern of gross violations of fundamental human rights, particularly against women and children. The question is, however, whether this goal could be legally pursued as a measure of self-defense under Art. 51 UNCh.³¹ The exercise of self-defense aims at repelling the armed attack of another state or entity and also at incapacitating the enemy to renew its attacks. To depose of the – however illegitimate – government of the enemy state is of a different quality. In the present case, the situation is complicated by the fact that the Taliban regime was not internationally recognized except by three states

³⁰ See <http://www.un.org/News/Press/docs/2001/afg152.doc.htm>.

³¹ Doubts in this regard are raised by *Tietje/Nowrot* (note 1), 15.

(Pakistan, United Arab Emirates and Saudi Arabia). It is significant that the Security Council in its Resolution 1378 only expressed its support of the "efforts of the Afghan people to replace the Taliban regime." It did not express its consent to the same efforts on the part of the United States and Great Britain. One has to admit, though, that the deposition of the Taliban regime could not be neatly separated from the fight against the Al'Qaida network. Yet, doubts remain about the soundness of stretching the concept of self-defense to the extent that it also covers the replacement of the government of the enemy state, be it only a *de facto* regime or not. This problem will be addressed later on.³²

Second and most importantly, there is the problem of the indeterminate character of the present measures of self-defense in terms of time and space. As already mentioned, the time frame of the actions against the Taliban regime and Al'Qaida is not objectionable as regards the time span between the attacks and the beginning of the self-defense measures if considered as an isolated event that is limited in time and space.³³ However, given the much wider goals that have been repeatedly stated by the President of the United States³⁴ and high officials of the Administration,³⁵ it is indispensable to discuss the question of self-defense in the wider political and legal context. With regard to the time dimension of self-defense in the present situation, one of the most significant facts is that from the day of the attacks on the Twin Towers and the Pentagon, the United States have unequivocally proclaimed to be at *war*. After a few days this term has been replaced by the concept of a "*new war*."³⁶ Thus the use of the term 'war' or 'new war' is significant because, whether in the legal meaning of traditional or pre-UN Charter International Law or in a non-legal, non-technical or ordinary sense, war signifies an open-ended process – open-ended in the sense that its end depends on whether one of the warring parties concedes de-

³² See, *infra*, D. I.

³³ See, *supra*, C. I..

³⁴ See Address to a Joint Session of Congress and the American People, Office of the Press Secretary, 20 September 2001, available at: <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>.

³⁵ See, for instance, Secretary of Defense *Donald Rumsfeld*, Creative Coalition Building for a New Kind of War, New York Times, 28 September 2001: One should "forget about exit strategies. We are looking at sustained engagement that carries no deadlines."

³⁶ See President *George Bush* in his Address to the Joint Session of Congress and to the American People (note 34) and ever since. He was joined in this terminology by the British Prime Minister *Tony Blair*, who stated that "*Whatever the technical or legal issues ... the fact is we are at war with terrorism*," cited from *Mégret* (note 1), section 1, 2. Also the American media, particularly CNN, reported about the September 11 events and the later developments under the heading "America's New War."

feat or the other considers the war aims to be achieved.³⁷ If – as it is the case here – the ‘war’ or ‘new war’ is carried on as a measure of self-defense – a concept that is limited in time by its very nature as a measure of self-help against an actual or clearly defined imminent attack³⁸ – self-defense clandestinely becomes open-ended as well. Conflating the concept of war, which in view of the prohibition of the use of force by Art. 2(4) UNCh is not a concept legally recognized by current international law except for its role in the *ius in bello*, with the concept of self-defense amounts to nothing less than a *carte blanche* for the *unilateral* use of force,³⁹ and is thus contrary to the letter and spirit of the Charter of the United Nations that was exactly designed to prohibit the unilateral use of force except within the limits of self-defense.⁴⁰ The so-called realists will strongly disagree with this conclusion. But that is because other means to achieve the same end, namely the elimination of global terrorism, are not in their view, *i.e.* collective action under the authority of the United Nations.

D. The Alternative Approach: Collective Security as International Police Action?

The preceding discussion of the widely – sometimes unequivocally, sometimes cautiously – accepted self-defense argument has shown that even going along with a very ‘liberal’ construction or interpretation of Art. 51 UNCh some serious concerns remain. In general, it is of little importance that international lawyers disagree on points of law. In this case, however, there is more at stake than just an academic controversy about some abstract legal problem. The international community as a

³⁷ For a detailed, critical discussion on the implications of the use of the term ‘war’ in the present context see *Mégret* (note 1) section 1, 1 *et seq.* and section 4, 1 *et seq.*; the “open in time” nature of the military action that began in Afghanistan is well-reflected in its code name “enduring freedom,” see *id.*, section 4, 2.

³⁸ It is to be noted that it means stretching the concept of self-defense if one includes the so-called ‘preventive’ self-defense – a concept that is very controversial but has been acquiesced to at times by the international community, the argument being that under specific conditions one cannot expect the potential victim to wait for the actual aggression to occur; however, the Israeli air strike against the Iraqi nuclear plant that Israel claimed to be an act of preventive self-defense, other uses of force against its Arabian neighbors, and the US air raid against Libya were strongly condemned as illegal, see *Tietje/Nowrot* (note 1), 14 with further references.

³⁹ Critical also *Dupuy* (note 1), 3.

⁴⁰ It is significant that *Tomuschat* (note 1), 545, while considering the military action in Afghanistan to be in line with Art. 51 UNCh although stretched to its extreme limits, clearly states that the arguments supporting the legality of the Afghanistan mission would not apply if this mission would be extended to other countries, with the consequence that Germany could not join in with such extended military actions. For these and similar reasons, other nations now partners in the coalition most likely will break away from the coalition that is on shaky ground anyway.

whole is facing a most serious challenge that is not new, in principle, but new in its global dimension, *i.e.* the threat of global terrorism. Today's terrorism is as much the result of globalization as are its positive effects that certainly can be observed, like the unprecedented interconnectedness of peoples, groups and individuals, the new opportunities of global communications technologies, cultural exchange *etc.*⁴¹ Global terrorism is deterritorialized, borderless and in a way ubiquitous. It is using modern communications technologies and is extremely well equipped to strike against its targets at any time anywhere with little man-power but in a neatly coordinated or concerted manner, as has been shown by the September 11 attacks.⁴² In this sense, terrorist attacks are novel. They escape the traditional concepts of armed conflict. Thus, the response to this new threat scenario has to be a new one as well. The starting point for an adequate strategy has to be a multifaceted, complex, and at the same time well-coordinated, collective enterprise based on the law. For legal and political reasons, this is not the time for unilateralism in whatever disguise. At stake is the credibility of the vision of a just and socially responsible international civil society under the rule of law. With this in mind the following section will first discuss the existing legal framework based on the Charter of the United Nations and the opportunities it holds out for an effective and longterm strategy to combat global terrorism. Secondly, it will discuss the political advantages of such a strategy but will also point at the price that the civilized world will have to pay for it.

I. There is widespread consensus that the fight against global terrorism clearly necessitates law enforcement measures including military means. The long chain of unanimously adopted Security Council Resolutions⁴³ condemning international terrorism and mandating all states to take effective measures to prevent terrorist attacks and to take action against the perpetrators of such acts, the various anti-terrorism conventions,⁴⁴ and last but not least the fact that the Security Council by its Resolutions 1368, 1373, 1377, and 1378, while not expressly authorizing the use of force, clearly accepted that military enforcement measures were undertaken,⁴⁵ are a

⁴¹ See David Held/Anthony McGrew (eds.), *The Global Transformations Reader*, 2000, *passim*; David Held/Anthony McGrew/David Goldblatt/Jonathan Perraton, *Global Transformations: Politics, Economics and Culture*, 1999, *passim*.

⁴² See James M. Smith/William C. Thomas (eds.), *The Terrorism Threat and U.S. Government Response: Operational and Organizational Factors*, 2001, available at: <http://www.usafa.af.mil/inss/>.

⁴³ SC Res. 748 of 31 March 1992; SC Res. 1044 of 31 January 1996; SC Res. 1054 of 26 April 1996; SC Res. 1070 of 16 August 1996; SC Res. 1160 of 31 March 1998; SC Res. 1199 of 23 September 1998; SC Res. 1203 of 24 October 1998; SC Res. 1214 of 8 December 1998; SC Res. 1267 of 15 October 1999; and SC Res. 1333 of 19 December 2000.

⁴⁴ See the enumeration by Schrijver (note 1), 274.

⁴⁵ See also the statement made by UN Secretary General Kofi Annan on 8 October 2001, where he indicated that the military action in Afghanistan was fully in line with the right to

clear indication of the consensus. It appears from this record, that there has been a chance not to base the military actions in Afghanistan on self-defense but rather on Chapter VII UNCh. Indeed, the main prerequisite for enforcement action under Chapter VII – the determination of a threat to international peace and security according to Art. 39 UNCh – had been met by Security Council Resolution 1373 in that it expressly determined that the terrorist attacks constituted a threat to international peace security,⁴⁶ and that therefore the Council, in adopting this binding Resolution, was acting under Chapter VII.⁴⁷ In addition, one may point to the repeatedly stated resolve of the Council to take all necessary steps to combat international terrorism.⁴⁸ Since the political decisions opted for self-defense, the preceding observations are irrelevant with regard to the Afghanistan mission. They are highly relevant for any future military actions that might become necessary and therefore should be seriously considered.⁴⁹ The reasons for this are both legal and political. In legal terms, enforcement measures under Chapter VII and based on a clear and well defined mandate from the Security Council are free of the doubts and questionable ‘stretchings’ of the law that surround the present self-defense approach. In addition, enforcement measures under Chapter VII could pursue aims that would not be covered by self-defense even if stretched to the extreme. If a regime is responsible for grave and persistent violations of human rights, including the support of terrorists who on their part are preparing or committing crimes against humanity, the Security Council, following its well-established practice of determining serious human rights violations within a given country to constitute a threat to international peace and security,⁵⁰ could authorize enforcement measures against that country. Had one followed that approach, questions about the legality of the deposition of the Taliban in the course of the self-defense actions would have been clearly unfounded.

self-defense, Press Release of 8 October 2001, available at: <http://www.un.org/News/dh/20011008.htm>.

⁴⁶ See, for instance, the third invocation of the preamble of Resolution 1373 of 28 September 2001.

⁴⁷ See Resolution 1373 of 28 September 2001 at the end of the preamble.

⁴⁸ See Resolution 1368 of 12 September 2001, section 5 of the operative part.

⁴⁹ In favor of pursuing the fight against global terrorism under the authority of the United Nations, *Mégret* (note 1), section 6, 5 *et seq.*, who considers the Security Council the most appropriate authority to ward off an increase in unilateralism, all its shortcomings (like its non-representative composition) notwithstanding; underlining the importance of Security Council involvement *Dupuy* (note 1).

⁵⁰ On this practice see *Jost Delbrück*, A Fresh Look at Humanitarian Intervention under the authority of the United Nations, *Indiana Law Journal* (ILJ), vol. 67, 1992, 867 *et seq.*; *id.*, A More Effective International Law or a “New World Law”? – Some Aspects of the Development of International Law in a Changing International System, *ILJ*, vol. 68, 1993, 705 *et seq.*

In political terms, basing the fight against global terrorism on collective actions under Chapter VII has major advantages as well. Whether one likes it or not, the United States has been and still is the number one target of global terrorism. This has to do with a number of reasons, among which are its exposed role as the only superpower and the exponent of the so-called Western life styles which are impacting the world over. In addition, instances of legally questionable power projections⁵¹ have contributed to the widespread anti-Americanism. If future enforcement measures against terrorism would be carried out under the authority of the United Nations, these measures would considerably gain in legitimacy. But more importantly, the acceptance of this approach by the United States would send out a politically weighty signal that it is willing to exercise its highly necessary leadership as an integral part of the anti-terrorism coalition. This coalition, in turn, would be greatly strengthened because particularly the less enthusiastic members are likely to stand by the coalition more firmly. In this context it is significant to note that, for instance, Pakistan, which had to overcome major political hurdles in joining the coalition, repeatedly and publicly relied on Resolutions 1368 and 1373 as a legitimization of its support for the military actions in Afghanistan, stating that it considered it as its obligation to do so as a member of the United Nations. Of course, one must not overlook the fact that in accepting the collective approach under Chapter VII, the United States would be subject to some restraints of their freedom of action as they perceive to possess it. But this loss in political choices would be outweighed by far by the gains in political respect for the United States on the part of the international community, in general, and by the gains with regard to the successful exercise of its political leadership within the framework of the United Nations, in particular.

II. There is also widespread consensus with regard to the second major element of a comprehensive strategy against global terrorism, *i.e.* the necessity of arresting and prosecuting those persons who have committed acts of terrorism. In view of the universal condemnation of terrorist acts, one could rightly consider such acts to constitute crimes against humanity.⁵² Thus, such acts are not acts of war but simply crimes for which individuals are liable and subject to criminal prosecution – be it under domestic or international jurisdiction, if such is available. As the International Criminal Court is not yet functioning, there is only the option that the Security

⁵¹ While the use of force by the United States against Libya in 1986 was generally received critically, the missile attacks on Sudan and Afghanistan in 1998 carried out as acts of self-defense were mostly seen as justified, see *Tietje/Nowrot* (note 1), 14 with further references; the latter also met with strong criticism, particularly in the Arab world.

⁵² See the definition of the crime against humanity in Art. 7 of the Statute of the International Criminal Court, reprinted in: *Human Rights Law Journal*, vol. 19, 1998, 453 *et seq.*; also Art. 18 of the Draft International Criminal Code adopted by the International Law Commission (ILC) in 1996, *Yearbook of the ILC*, 1996, vol. II, Part 2, 17, 47; accepting terrorist acts as crimes against humanity *Tomuschat* (note 1), 536; *Cassese* (note 1), section 2, 1 *et seq.*; *Kirgis* (note 1), 1; *Cerone* (note 1), 4; *Paust* (note 1), 8.

Council sets up an *ad hoc* Tribunal under Chapter VII UNCh. In view of the condemnation of international terrorism and the call for the prosecution of the perpetrators of acts of terrorism, no objections could be raised against the prosecution of those responsible for the September 11 attacks with regard to the *nullum crimen sine lege* and the *nulla poena sine lege* principles. To establish an *ad hoc* Tribunal under the authority of the United Nations, again, would be signal that the fight against terrorism is a serious concern of the international community. Politically, it would be a prudent step to take in order to avoid possible charges that individual states, particularly those affected by the terrorist acts, would not be able to provide a fair trial to which terrorists – no matter of the seriousness of their crimes – are entitled.⁵³ On a positive note, it is to be noted that the Security Council has taken strong steps to oblige the member states to closely cooperate in the efforts to apprehend and prosecute terrorists as a part of the ongoing campaign against terrorism – steps that seem to meet broad acceptance in the international community.

III. A third element of anti-terrorism must be increased efforts to bring to an end some of the major conflicts besetting several regions of the world. The most important among these is the Near East conflict between Israel and the Palestinians. Whether the September 11 attacks were in some way related to the Near East conflict is rather immaterial. Overlooking the history of this conflict, one cannot but recognize the responsibility of the United Nations to play a major role in the efforts to energetically push the peace process – together, of course, with those countries that carry a special responsibility, be it as close allies of Israel, be it for historical and moral reasons as in the case of Germany. It has been said that nothing will be the same after the September 11 attacks. If this observation is to be more than just rhetoric, the international community in general and more concretely – and along the saying that each one should clean its own doorsteps first – the European and other Western countries should seize the opportunity to step back and make an in-depth search as to possible mistakes that were made in their foreign policies towards, for example, the Near East.

IV. An indispensable and highly important short- and longterm element of anti-terrorism consists in increased complimentary efforts to reduce and eventually eliminate the glaring disparities in wealth around the globe. As *David Held* has aptly observed:

⁵³ The question as to the legal status of terrorists captured in the course of the military action in Afghanistan cannot be dealt with here at length. Only that much may be mentioned: the rhetoric about war seems to indicate – and in a sense rightly so – that terrorists falling into the hands the military in Afghanistan should be accorded the status of prisoners of war. In fact, however, as terrorists they are not regular combatants but ordinary criminals and thus only entitled to the relevant human rights standards for the treatment of prisoners, as enshrined, *e.g.*, in the UN Covenant of Political and Civil Rights, Ga Res. 2200A (XXI) of 16 December 1966; see a similar position *Tomuschat* (note 1), 536.

"Thus, the complex and differentiated narratives of globalization point in stark and often contradictory directions. On the one side, there is the dominant tendency of economic globalization over the last three decades towards a pattern set by the deregulatory, neo-liberal model; an increase in the exit options of corporate and finance capital relative to labour and the state, and an increase in the volatility of market responses, which has exacerbated a growing sense of political uncertainty and risk; and the marked polarization of global relative inequalities (as well as serious doubt as to whether there has been a 'trickle down' effect to the world's poorest at all). On the other side, there is the significant entrenchment of cosmopolitan values concerning the equal dignity and worth of all human beings; the reconnection of international law and morality; the establishment of regional and global systems of governance; and growing recognition that the public good – whether conceived as financial stability, environmental protection, or global egalitarianism – requires coordinated multilateral action if it is to be achieved in the longterm."⁵⁴

Reaping the greatest part of the harvest produced by globalization carries with it the responsibility to ensure a globalization with a human face. That there is a growing consciousness of this responsibility was evidenced by the most recent World Economic Forum in New York.⁵⁵ But such consciousness has to develop within the societies of the first world countries at large. It has to be part of the anti-terror strategy that people in these countries realize that they can and have to contribute to the efforts by accepting that more has to be done in terms of effective development aid which in turn would or will affect our daily lives. Furthermore, an effective anti-terrorism strategy must include a 'crusade' for inter-cultural tolerance and respect – something that is not to be treated in political rhetoric, but needs to be implemented by each individual.

⁵⁴ *Held* (note 3), 9 *et seq.*

⁵⁵ See address of the World Economic Forum by the IMF President *Horst Köhler* on 2 February 2002, *cf.* http://news.bbc.co.uk/1/hi/english/business/newsid_1791000/1797853.stm.